UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re JAMES E. RUETER, Debtor.	Case No. 590-05812-MM
LEONARD A. YERKES, III, et al., Plaintiffs, vs. JAMES E. RUETER, Defendant.	Adversary No. 91-5-294
BEN & GEORGIANNA STILLMAN, THE DOLLAR COMPANY, Plaintiffs, vs. JAMES E. & EVA K. RUETER, Defendants.	Adversary No. 91-5-297 **MEMORANDUM OPINION AND ORDER THEREON**

INTRODUCTION

This matter comes before the Court on the Defendant's Motions for Summary Judgment filed in two adversary proceedings, Yerkes, et al. v. Rueter, Adversary Proceeding No. 91-5294, and Stillman v. Rueter, Adversary Proceeding No. 91-5297. The underlying issue in both of these cases is whether

the agreement between the parties is a loan or an investment. For the reasons that follow, the Motions for Summary Judgment are denied. This order relates to both cases.

FACTS RELATING TO YERKES, ET AL. V. RUETER

The plaintiffs are an investment group consisting of Leonard Yerkes, III, Harold Talbot, the Estate of Leonard Yerkes, Jr., Phillip Yerkes, and George Kerr (the "Yerkes Group"). The plaintiffs brought this dischargeability action based upon a written agreement dated February 1, 1989. The agreement provides that the plaintiffs would "loan" the debtor $200,000 secured by a junior deed of trust on the property commonly known as the Los Altos Athletic Club Building (the "Property"). The agreement contemplated that the proceeds of the loan or investment were to be used for improvements to the Property, which was owned by the debtor. It also provided that the plaintiffs would receive a percentage interest in the net proceeds upon the sale of the Property.

Whether the parties intended this transaction to be characterized as a loan, an investment, or a partnership is not clear. The terms of this transaction were documented in a Loan Agreement, which contained an integration clause, and a non-recourse Secured Promissory Note. Rueter also recorded a Deed of Trust and Rent Assignment in favor of the plaintiffs. The deposition testimonies of Leonard Yerkes, III ("Yerkes") and Rueter regarding the representations that Rueter made concerning the transaction conflicted at various points.

Rueter defaulted on the senior lien on the Property in January 1990, and a senior lienholder foreclosed on the Property on May 15, 1990. The Los Altos Athletic Club, the primary tenant in the Property, made monthly rental payments on the Property during late 1989 and early 1990 sufficient to service at least a portion of the monthly debt payments. However, Rueter testified that he could not account for or trace the funds related to the Property. Yerkes testified that he had no personal knowledge that the debtor diverted rental proceeds to the debtor's own use.

The plaintiffs assert that the debtor was obligated to use the rental proceeds from the Los Altos project to pay the senior debt, that he failed to do so or to account for them, and that, instead, he collected the rents, commingled them with personal funds and the funds of an affiliated company, and converted them to his personal use. They also assert that the parties intended to share both the profits

and the losses on the Property.

FACTS RELATING TO STILLMAN V. RUETER

The plaintiffs, Ben and Georgianna Stillman and the Dollar Company, brought this dischargeability action based upon a written agreement dated September 12, 1988. The agreement provides that the Stillmans were to "loan" the debtor $197,500 secured by a junior deed of trust on the Los Altos Athletic Club Building. The proceeds of the "loan" were intended to be used for improvements to the Property, which was owned by the debtor. The Stillmans also would receive a percentage interest in the net proceeds of the sale of the Property. Again, the intent of the parties in characterizing this transaction as a loan, an investment, or a partnership is not clear. The terms of this arrangement were documented in a Loan Agreement, a non-recourse Secured Promissory Note, and a Deed of Trust with Rent Assignment, which was recorded.

As noted in the facts underlying the Yerkes claim, a senior lienholder foreclosed on the Property on May 15, 1990, extinguishing the Stillman's junior interest. Like the Yerkes Group, the Stillmans assert that the debtor had an obligation to apply the rental proceeds from the Property to the senior debt, that he failed to do so or to account for them, and that, instead, he collected the rents, commingled them with other funds, and converted them to his personal use. The Stillmans also assert that the parties intended to share both profits and losses on the Property.

DISCUSSION

The issue that is central to each of these cases is whether the agreement between the parties is a loan or an investment. To make that determination, the Court must rely on general principles of contract interpretation under California law. See Cal. Civ. Code §§ 1635-1662. See also Sunniland Fruit, Inc. v. Verni, 233 Cal. App. 3d 892, 284 Cal. Rptr. 824 (Cal. Ct. App. 1991). Neither of the parties have adequately briefed this issue in support or opposition of summary judgment.

A. Standard for Summary Judgment

Under F.R.C.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Only genuine disputes over material facts that might determine the outcome of the suit under applicable law will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). A dispute over material facts is genuine if the evidence is such that a fact finder could reasonably find in favor of the non-moving party. Id. The non-moving party must therefore counter the motion with specific facts showing that there is a genuine issue for trial. Id.

The Court must also consider the applicable standard of proof and which party bears the burden of proof. Id. at 2512. Summary judgment is proper if a party fails to make a sufficient showing of an element essential to that party's case, and on which that party bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 316, 106 S.Ct. 2548, 2552 (1986). In this case, the plaintiff bears the burden of proof by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654, 661 (1991).

However, for purposes of summary judgment, the moving party bears the initial responsibility of informing the Court of the basis for its motion and of identifying the evidence that demonstrates the absence of a genuine issue of material fact. Celotex, 106 S.Ct at 2553. The evidence is to be viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in his favor. Anderson, 106 S.Ct. at 2513.

"Summary judgment is such a drastic procedure that it should be used sparingly so that no party having a scintilla of merit to his claim or defense should be denied his day in court." In re Schuck, 13 Bankr. 461, 465 (Bankr. M.D. Pa. 1980). "Even if the Court surmises that the [non-moving] party is unlikely to prevail at trial, that by itself in not justification for granting summary judgment." Id. at 463.

B. Yerkes' Claim for Nondischargeability Under § 523(a)(2) for Obtaining Money by a False Representation

With respect to the Yerkes Group's claim for relief based on alleged false representations, there appears to be a genuine issue of fact as to whether the written agreement accurately expresses the intention of the parties. If Rueter made any compelling representations to the plaintiffs that were fraudulent, then the Court may look beyond the plain meaning of the agreement to determine the intent

of the parties. See Cal. Civ. Code § 1640; Sunniland Fruit, Inc. v. Verni, 233 Cal. App. 3d 892, 284 Cal. Rptr. 824 (Cal. Ct. App. 1991).

C. Yerkes' and Stillmans' Claims for Nondischargeability Under § 523(a)(4) for Fraud or Defalcation in a Fiduciary Capacity and Under § 523(a)(6) for Willful and Malicious Injury

With respect to both the Yerkes Group's and the Stillmans' claims for relief based upon the breach of a fiduciary duty and a willful and malicious injury, there exists a genuine issue of fact as to whether the written agreements accurately express the intention of the parties. If it is appropriate for the Court to consider the intention of the parties, it may affect the outcome of the cases. For example, although the status as a fiduciary for dischargeability purposes is narrowly defined under federal law, state law is consulted to determine when a trust exists. Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1985). Under California law, it is immaterial whether the parties designate the relationship as a partnership or realize that they are partners, for the intent may be implied from their acts. Greene v. Brooks, 235 Cal. App. 2d 161, 166 (1965). This is relevant because partners are fiduciaries under California law within the meaning of section 523(a)(4). Ragsdale, 780 F.2d at 796.

Similarly, under section 523(a)(6), the intention of the debtor would determine whether a debt is dischargeable because it was incurred as a result of a willful and malicious injury. To prevail on a claim under section 523(a)(6), a creditor must show that the debtor committed a wrongful act both willfully and maliciously, which requires the showing of a deliberate and intentional act. In re Littleton, 942 F.2d 551, 554 (9th Cir. 1991).

Rueter has not met his burden of persuasion on summary judgment. There still remains a seed of doubt that the Court must consider the intent of the parties at the time they entered the agreement.

CONCLUSION

The central issue in these cases is whether the agreement is a loan or an investment. Subject to limited exceptions, such as the presence of an ambiguity, the intention of the parties to a contract is determined from the written agreement alone.

The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 10A Wright, Miller & Kane § 2727, p. 124. Summary judgment should not be granted unless it is absolutely clear that a trial is unnecessary. Anderson, 477 U.S. at 255. In this instance, the moving party has not met its burden of persuasion that there is an absence of evidence to support the non-moving party's case. Therefore, the Defendant's Motions for Summary Judgment are denied.

Good cause appearing,

IT IS SO ORDERED.